UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL RODRIGUEZ,	:	
	:	REPORT AND RECOMMENDATION
Petitioner,	:	To the Honorable Shira A. Scheindlin
	:	United States District Judge
	:	
-v.-	:	02 Civ. 9036 (SAS) (GWG)
	:	01 Cr. 275 (SAS)
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE

Daniel Rodriguez, appearing pro se, brings this petition for writ of habeas corpus under 28 U.S.C. § 2255. Rodriguez pled guilty to conspiring to violate the federal narcotics laws and was sentenced principally to 135 months of incarceration, followed by five years of supervised release. He argues that: (1) his due process rights were violated because the Government failed to move for a reduction in his sentence based on assistance he provided to the Government and (2) his counsel was ineffective. For the reasons stated below, Rodriguez's petition should be denied.

I. BACKGROUND

A. Rodriguez's Arrest, Plea and Sentence

On January 30, 2001, Rodriguez was arrested and charged with conspiracy to violate the federal narcotics laws. See Complaint (01 Mag. 145), filed January 30, 2001. A grand jury indicted Rodriguez on March 27, 2001 for conspiracy to distribute more than one kilogram of heroin.

On August 1, 2001, Rodriguez executed a plea agreement with the Government. See Letter from Sean Eskovitz, dated July 31, 2001 ("Pl. Ag."). The plea agreement stipulated that upon Rodriguez's plea of guilty to the narcotics conspiracy charge, the United States Sentencing Commission Guidelines Manual ("U.S.S.G." or "Sentencing Guidelines") required a sentencing range of 135-168 months imprisonment. Id. at 3. The agreement also stated that "[t]he parties agree that neither a downward nor an upward departure is warranted in this case. Accordingly, neither party will seek such a departure or seek any adjustment . . . or suggest that the Court sua sponte consider such a departure or adjustment." Id. Most importantly for purposes of this petition, the agreement also provided that Rodriguez would not "appeal, []or otherwise litigate under Title 28, United States Code, Section 2255, any sentence within or below the Stipulated Guidelines Range (135 to 168 months) . . . ." Id. at 4.

On the same date he entered into the agreement, August 1, 2001, Rodriguez pled guilty before the undersigned. At the plea allocution, the Court determined Rodriguez was fully competent to enter an informed plea and that he understood the rights he was waiving by entering a plea of guilty. See Transcript, dated August 1, 2001 ("Pl. Tr."), at 4, 6-9. During the allocution, Rodriguez confirmed that he had reviewed the indictment, understood the charges against him, discussed his case with his attorney, and was satisfied with his attorney's representation. Id. at 4-5. He further confirmed that he had entered into the plea agreement voluntarily and that no promises were made to him about the sentence he would receive other than what was contained in the plea agreement. Id. at 9. He stated that he understood that the sentence would be "entirely up to Judge Scheindlin" and that in exercising her discretion Judge Scheindlin would be limited only by what the law required. Id. at 9-10. He also stated that he

understood that he would be bound by his guilty plea even if he was "surprised or shocked or disappointed" by his sentence. Id. at 10.

With respect to the plea agreement, Rodriguez confirmed that his attorney had explained to him all of its terms and conditions before he signed it and that he understood that the Sentencing Guidelines range could be expected to be from 135 to 168 months. Id. at 10-11. He also stated that he understood that he was giving up his right to challenge any sentence of 168 months or less -- either through appeal or other application to the trial court. Id. at 11-12.

The Probation Department subsequently prepared a Presentence Investigation Report, which conformed to the guideline calculations set forth in the plea agreement, resulting in a sentencing range of 135 to 168 months. See Presentence Investigation Report, dated November 28, 2001 ("PSR") at 13, 17. On April 8, 2002, Rodriguez appeared before Judge Scheindlin for sentencing. Rodriguez's counsel confirmed that he had reviewed the PSR with Rodriguez and had no objections to it. Sentencing Transcript, dated April 8, 2002 ("S."), at 2-3. During the proceeding, Rodriguez's counsel made reference to Rodriguez's attempt to cooperate with the Government when he stated:

> My client has proffered to the government[.] [I]t has been unavailing as of this time. We still remain optimistic that maybe sometime in the future the government will call upon [Rodriguez] and he will be within the time constraints of Rule 35.

Id. at 5. Rodriguez was asked if he wished to be heard with respect to his sentence. Id. at 6. He stated only that he "would like to apologize to the American public and to your Honor as well." Id. The court subsequently sentenced Rodriguez to 135 months imprisonment. Id. at 9. A judgment of conviction was filed on April 22, 2002. Rodriguez did not appeal.

B. The Instant Petition

Approximately seven months later, on November 13, 2002, Rodriguez filed a document entitled "Request to the United States Office of the 'AUSA' to File a Motion Under Criminal Rule 35(b) Title 18 § 994 [sic]" ("Petition"). The district court notified Rodriguez that the motion would be construed as a petition under 28 U.S.C. § 2255. See Order, dated November 13, 2002, at 2. Rodriguez subsequently confirmed that he wished to pursue his action under section 2255. See Petitioner's Affirmation, dated November 25, 2002. The Government submitted a letter in opposition to the motion on April 15, 2003. Rodriguez filed a reply on May 14, 2003.

Rodriguez's petition does not precisely set forth the grounds on which he seeks to challenge his judgment of conviction. Nonetheless, it is apparent that he makes two basic claims: (1) that the Government improperly failed to move to reduce his sentence either by way of a downward departure motion under U.S.S.G. § 5K1.1 or by motion pursuant to Fed. R. Crim. P. 35(b), thereby violating his due process rights; and (2) his counsel was ineffective.

II. DISCUSSION

A. Section 2255 Relief

28 U.S.C. § 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Relief under this statute is only available "for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in complete miscarriage of justice." Graziano v. United States, 83 F.3d 587, 590 (2d Cir. 1996) (internal quotations marks and citations omitted).

B. Claim Regarding the Failure to Reduce Sentence

Rodriguez contends that, at the Government's request, he provided the Government with information about the criminal activity of ten individuals, which led to at least two arrests. Petition at 2-6. While he details the information he provided about these individuals, he does not specify when he provided this information. Presumably, at least some if not all of the information was provided prior to his sentence inasmuch as his counsel made allusion to Rodriguez's cooperation at sentencing. (S. 5). Rodriguez claims that the "fundamental reason" for his cooperation was that he expected the Government to make a motion to reduce his sentence. See Motion in Respond a Government Opposition in Defendant Recharacterized Rule 35(b) as Habeas Corpus Title 28 U.S.C. § 2255 ("Reply"), at 4. He asserts that the Government's failure to make the motion constitutes prosecutorial misconduct and a violation of his due process rights. Id. at 7; Petition at 10. Rodriguez also contends that his assistance was so substantial that the court should have considered a downward departure sua sponte. Reply at 6. The Government argues that Rodriguez's claim is barred by the plea agreement and also procedurally barred by his failure to raise this claim on direct appeal. See Letter from Assistant United States Attorney Neil M. Barofsky to the Honorable Shira A. Scheindlin, dated April 15, 2003 ("Gov't Letter"), at 4-6. The Government further argues that even if Rodriguez's claim is not barred, the Government has great discretion in deciding whether or not a motion for a

downward departure should be made and that a defendant has no right to require the Government to make such a motion. Id. at 6-7.

1. Effect of the Plea Agreement on this Petition

Generally, a knowing and voluntary waiver of the right to file a motion under 28 U.S.C. § 2255 is enforceable. See Garcia-Santos v. United States, 273 F.3d 506, 508 (2d Cir. 2001) (enforcing waiver of appeal and collateral attack in plea agreement because defendant entered into the plea knowingly and voluntarily); accord Pena v. United States, 201 F. Supp. 2d 231, 233-35 (S.D.N.Y. 2002). As noted in United States v. Rosa, 123 F.3d 94 (2d Cir. 1997), a plea agreement is valuable to both defendants and the Government: it gives the defendant reasonable certainty as to the extent of his liability and punishment, while the Government avoids the expense and uncertainty of future litigation. Id. at 97.

To preserve the value of plea agreements, the Second Circuit has held -- in the context of the waiver of a right to appeal -- that:

> [i]n no circumstance . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless.

United States v. Salcido-Contreras, 990 F.2d 51, 53 (2d Cir.) (per curiam), cert. denied, 509 U.S. 931 (1993). The same principle applies to a waiver of a right to file a section 2255 petition. While a waiver may be set aside where constitutional errors are implicated, see Rosa, 123 F.3d at 101 (expressing willingness to set aside a waiver and accept appeal "when constitutional concerns are implicated"); United States v. Jacobson, 15 F.3d 19, 23 (2d Cir. 1994) (reliance at sentencing on unconstitutional factors, such as race or naturalization status, is reviewable despite

a waiver of appeal), no such constitutional errors have been alleged here -- other than the claim of ineffective assistance of counsel, which is discussed in section II.C below.

Here, the plea agreement explicitly stated that Rodriguez waived his right to challenge any sentence of 168 months or less under 28 U.S.C. § 2255. Pl. Ag. at 4. Rodriguez confirmed that he understood all the terms and conditions of the plea agreement, had signed it voluntarily and that no promises were made to him outside of the agreement. (Pl. Tr. 9-10, 12). Moreover, Rodriguez explicitly stated that he understood that, as long as the sentence was not more than 168 months, he was "giving up [his] right to challenge th[e] sentence, both through an appeal to the Court of Appeals or by an application to the trial judge." (Pl. Tr. 11-12). He received a sentence of 135 months. (S. 9). Consequently, the plea agreement bars him from bringing a section 2255 motion to challenge his sentence.

2. The Merits of Rodriguez's Claims

Even if consideration of the merits of Rodriguez's claim were not barred by the plea agreement, there is no authority for a district court to grant a downward departure under U.S.S.G. § 5K1.1 in the absence of a motion by the Government. See Wade v. United States, 504 U.S. 181, 185 (1992); see also United States v. Reina, 905 F.2d 638, 641 (2d Cir. 1990) ("It is clear that the language of the sentencing guidelines does not provide for downward departure where the government has not made a motion."). In addition, by its explicit terms, Rule 35(b) permits a sentence reduction only upon the Government's motion. See, e.g., United States v. Rasco, 1991 WL 150525, at *2 (S.D.N.Y. July 26, 1991) ("the court may not, sua sponte, without a motion from the government, reduce defendant's sentence under Rule 35(b). The plain language of the rule mandates that the court may not reduce a defendant's sentence without a motion by the

government."). Thus, case law makes plain that "[t]he question of 'substantial assistance' is 'self-evidently a question that the prosecution is uniquely fit to resolve' [and] the decision by the prosecutor to forego a downward departure motion in a particular case is not subject to judicial review at all." United States v. Rexach, 896 F.2d 710, 713 (2d Cir. 1990) (quoting United States v. Huerta, 878 F.2d 89, 93 (2d Cir. 1989)), cert. denied, 498 U.S. 969 (1990).

The only apparent limitation on this rule is that the Government's decision not to move for a sentence reduction may not be motivated by unconstitutional motives, such as race or religion. See Wade, 504 U.S. at 185-186 (U.S.S.G. § 5K1.1 motion); see also United States v. Gangi, 45 F.3d 28, 31 (2d Cir. 1995) ("We are persuaded that, due to similarity of language and function, § 5K1.1 should inform our construction of Rule 35(b)."). A claim that a defendant provided substantial assistance or generalized allegations of improper motive does not, however, entitle him to a remedy, discovery or an evidentiary hearing to determine the Government's reasons for deciding not to file a motion. See Wade, 504 U.S. at 186. Indeed, a defendant does not have a right to "discovery or an evidentiary hearing unless he makes a substantial threshold showing [of an unconstitutional motive]." Id. (internal quotation marks and citations omitted). Moreover, a hearing is not required when a court decides it "would add little or nothing to the written submissions." Chang v. United States, 250 F.3d 79, 86 (2d Cir. 2001).

In the present case, Rodriguez alleges that the Government fraudulently induced him to provide incriminating information about ten individuals and failed to reward his cooperation. Petition at 2-7; Reply at 7-8. Because he makes no claim of an unconstitutional motive for the Government's conduct, no judicial review of the Government's failure to seek a reduction in his sentence would be available, even if he had not waived his right to challenge his sentence. See

Rexach, 896 F.2d at 713 (citing Huerta, 878 F.2d at 94). Rodriguez's citations to United States v. Martin, 25 F.3d 211 (4th Cir. 1994), and United States v. Drown, 942 F.2d 55 (1st Cir. 1991), are not relevant because neither case involved an explicit agreement that a downward departure motion would not be made, as in the present case.

C. Claim of Ineffective Assistance of Counsel

1. Effect of the Plea Agreement

Rodriguez also claims that his counsel was ineffective, thereby violating his Sixth Amendment right to adequate representation. Petition at 8. While, as discussed in section II.B.1 above, the face of the plea agreement bars any challenge under section 2255, "a waiver of appellate or collateral attack rights does not foreclose an attack on the validity of the process by which the waiver has been procured, here, the plea agreement." Frederick v. Warden, Lewisburg Corr. Facility, 308 F.3d 192, 195 (2d Cir. 2002) (citing United States v. Hernandez, 242 F.3d 110, 113-14 (2d Cir. 2001)). Thus, a claim that the plea was itself the product of ineffective assistance of counsel will survive even a written agreement not to collaterally challenge a sentence. "The rationale is that 'the very product of the alleged ineffectiveness' cannot fairly be used to bar a claim of ineffective assistance of counsel." Hernandez, 242 F.3d at 114 (quoting Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999)) (construing effect of waiver of right to appeal).

While Rodriguez may rely on this doctrine to attack his plea on the ground that it was the product of ineffective assistance of counsel, he may not rely on the doctrine to attack his sentence on such grounds. This is because Rodriguez explicitly agreed not to challenge any sentence of 168 months or less. Thus, if his plea is valid, Rodriguez's agreement not to challenge his

sentence is enforceable even in the face of ineffective assistance of counsel during the sentencing phase. In a similar circumstance -- involving a waiver of the right to appeal -- the Second Circuit barred any consideration of such a claim, noting that "[i]f we were to allow a claim of ineffective assistance of counsel at sentencing as a means of circumventing plain language in a waiver agreement, the waiver of appeal provision would be rendered meaningless." United States v. Djelevic, 161 F.3d 104, 107 (2d Cir. 1998). The same rationale applies to a challenge under section 2255. Thus, any challenges to counsel's effectiveness relating to sentencing cannot be reviewed.

Here, Rodriguez's petition is particularly unclear as to the precise basis for his ineffective assistance claim. Nonetheless, giving the petition the most liberal possible construction, see, e.g., Chang, 250 F.3d at 86 n.2, it appears that he asserts that his counsel was ineffective: (1) by allowing him to agree to the provision in the plea agreement that barred any downward departure motion -- in effect to waive his ability to benefit from a U.S.S.G. § 5K1.1 motion -- and to accede to the sentencing range of 135-168 months; and (2) by not informing him of the potential for a motion under Fed. R. Crim. P. 35(b) for substantial assistance after sentencing. Reply at 3-6, 10. This second claim, however, is plainly a challenge to the sentence -- not to the plea itself -- and under Djelevic this Court may not review it.

Accordingly, the only claim this Court may consider is Rodriguez's claim that his attorney was ineffective in allowing him to accede to the no-downward-departure provision and to the sentencing range.

2. The Merits of the Ineffective Assistance Claim

In order to prevail on a claim of ineffective assistance of counsel, a petitioner must show that: (1) counsel's representation fell below constitutionally acceptable standards, and (2) the allegedly deficient performance was prejudicial. See Strickland v. Washington, 466 U.S. 668, 687 (1984); accord Massaro v. United States, 123 S. Ct. 1690, 1694 (2003). "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. . . . Judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 687, 689. To show prejudice in the context of a guilty plea, there must be a showing of "'a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.'" United States v. Coffin, 76 F.3d 494, 498 (2d Cir. 1996) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

Rodriguez cannot meet this high standard. His claim fails because he has not pointed to any facts to show that his counsel's alleged errors "fell below an objective standard of reasonableness." As already discussed, Rodriguez's attorney had no basis on which to force the Government to move for downward departure prior to his plea based on Rodriguez's cooperation. See Section III.B.2 above. Even assuming that Rodriguez provided cooperation prior to his sentencing, the decision to make the motion is the Government's alone and, in the absence of unconstitutional motive, is not reviewable by the district court. See id. There is no suggestion in the record that the Government wished to make such a motion but was thwarted in its efforts by Rodriguez's attorney. To the contrary, the Government has argued forcefully in its opposition to the petition that Rodriguez was not entitled to such a motion. See Gov't Letter at

6-7. Thus, Rodriguez's attorney did not act unreasonably in acceding to the plea agreement's provision that a downward departure would not be made or in advising Rodriguez to so agree.

As to his sentencing range, Rodriguez suggests it was miscalculated because he did not receive the additional one point reduction in his offense level available under U.S.S.G. § 3E1.1(b)(2) for timely notifying authorities of his intention to plead guilty, thereby permitting the Government to avoid preparing for trial. Petition at 7. This suggestion is apparently based on Rodriguez's misunderstanding of a paragraph in the PSR, see PSR at 13, ¶ 73, and a letter from the Assistant United States Attorney to his counsel. See Petition at 7. In fact, Rodriguez received the maximum reduction of three levels for accepting responsibility for an offense under U.S.S.G. § 3E1.1, including the one-point reduction under section 3E1.1(b)(2). See S. 4; PSR at 8, ¶ 34; Pl. Ag. at 2. Thus, there was no error in calculating his offense level and it was obviously reasonable for his counsel to assent to a correct sentencing range and to so advise Rodriguez.

Thus, Rodriguez's ineffective assistance of counsel claim must be rejected.

III. CONCLUSION

For the foregoing reasons, Rodriguez's 28 U.S.C. § 2255 motion should be denied.

Notice of Procedure for Filing Objections to this Report and Recommendation

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties have ten (10) days from service of this Report and Recommendation to file any written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Shira A. Scheindlin, 500 Pearl Street, New York, New York 10007, and to the chambers of the

undersigned at 40 Centre Street, New York, New York 10007. Any request for an extension of time to file objections must be directed to Judge Scheindlin. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report and Recommendation on appeal. See Thomas v. Arn, 474 U.S. 140 (1985).

Dated: July 14, 2003
New York, New York

GABRIEL W. GORENSTEIN
United States Magistrate Judge

Copies sent to:

Daniel Rodriguez
45117-054
Fort Dix Federal Correctional Institution
P.O. Box 2000
East Building 5752-2
Fort Dix, NJ 08640

Neil Barofsky
Assistant United States Attorney
One Saint Andrew's Plaza
New York, NY 10007

Hon. Shira A. Scheindlin
United States District Judge